IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 74 OF 2006

Shri Sayed Babalal H.,
R/near Gharkul Co-operative
Housing Society, Bainguinim,
Old Goa, Ilhas, Goa.
Presently residing at Navelkar
Estate, C-6-G1, Bainguinim,
Old Goa, Ilhas Goa. .... Appellant

V/s

Shri Damodar S. Prabhu,
Residing at a/4,
Shri Om Co-operative Housing Society,
Cujira, St. Cruz,
Ilhas-Goa. .... Respondent

Shri Arun Bras De Sa, Advocate for the Appellant.
Shri A.D. Bhobe, Advocate for the Respondent.

CORAM : N.A. BRITTO, J.

DATE : 14th AUGUST, 2007

ORAL JUDGMENT :

This is complainant's appeal against the acquittal of the accused, by judgment dated 29/04/2006 of the learned Assistant Sessions Judge, Panaji, under Section 138 of the Negotiable Instruments Act, 1881. The accused was earlier convicted by the learned JMFC by judgment dated 25/11/2005.

2. The complainant is a contractor. The accused is a tax consultant. Admittedly, the accused had issued 6 signed cheques in favour of the

complainant. In respect of 4 cheques which were the subject matter of 3 complaints, the accused has been convicted and sentenced and his appeals against the said conviction/sentence have been dismissed, and, 3 Revision Petitions filed by him are pending before this Court. In respect of another cheque of Rs. 65,000/- the dispute between the complainant and accused was settled by payment on 3/06/2003. This appeal pertains to the cheque dated 23/10/2000 for a sum of Rs. 4,30,000/-.

3. The case of the complainant, in brief, was that he had advanced to the accused in October, 2000 a sum of Rs. 4,30,000/-, as the accused was in business, which amount the accused had promised to repay within a period of two and a half months and had issued in favour of the complainant the said cheque which when deposited was returned dishonoured for insufficiency of funds, whereupon the complainant addressed a statutory notice dated 23/11/2000 to the accused to make the payment of the said sum which the accused received on 30/11/2000 but failed to comply the same. The complaint was filed on 5/01/2001.

4. In support of the complaint, the complainant examined himself and produced the necessary documents. The accused also examined himself. As per the accused, in his statement recorded under Section 313 of the Code, the accused had issued 4 cheques, though otherwise it is conceded on behalf of

the accused, that in all 6 cheques were issued by the accused and which statement the accused also maintained in his defence evidence.

5. There is also no dispute that the evidence of the complainant was completed on 22/10/2003. Prior to that on 30/10/2002 an application was filed on behalf of the accused, stating that the accused would make full payment within a period of 2 months from the date of the said application. Another application was filed on 2/06/2004 stating that the accused wanted to settle the matter by making payment. There is also no dispute that thereafter the accused paid to the complainant a sum of Rs. 10,000/- on 30/06/2004, Rs. 2,500/- on 4/08/2004, Rs. 5,000/- on 30/04/2005 and Rs. 5,000/- on 4/07/2005. Although the accused did not take any specific plea in the cross-examination of the complainant, or for that matter in his examination under Section 313 of the Code, in his defence evidence, the accused stated that he had taken a sum of Rs. 1, 50,000/- from the complainant and he had given 6 blank cheques to him with a mutual understanding that the complainant would fill in one cheque for Rs. 25,000/- for 6 different months after taking the consent of the accused. The accused also stated that the complainant, without consulting him and without his consent, deposited all the said cheques in the month of November, 2000 by putting different amounts as per his wishes. However, the accused who is a tax consultant himself did not explain as to why he did not fill in each of the said cheques for Rs. 25,000/-

with 6 different dates of the months when they were required to be presented.

6. The learned trial Court by judgment dated 25/11/2005 came to the conclusion that the evidence of the complainant corroborated the allegations in the complaint. The learned trial Court also came to the conclusion that the complainant had proved all the ingredients of Section 138 of the Act and also noted that the accused had not brought out by way of reply, his plea of giving the 6 blank cheques i.e. that the accused had not taken the plea of giving 6 blank cheques either in the reply to the demand notice nor in the examination of the complainant but had come with the said plea in 313 statement which was an afterthought and which was not substantiated by any cogent material and, therefore, could not be believed. In fact the said plea was not even taken in 313 statement but only in defence evidence. The learned trial Court also found that the evidence of the accused did not inspire any confidence and thus the accused had failed to rebut the presumption available to the complainant under Section 139 of the Act.

7. However, the learned first appellate Court found that the complainant was unable to prove that he had shown the amount lent by him to the accused from the income tax returns and, therefore, it was highly improbable to believe that any man of prudence would advance such big sum without any writing and without any security. The learned first appellate Court also

examined the cheque and found that the writing on the cheque was not completed at one time and found that the name, the date and the amount were written at different points of time and this the learned appellate Court did, without there being any material whatsoever in the cross-examination of the complainant. On that aspect, and which exercise of comparison of handwriting the learned appellate Court was not entitled to do. At the same time the learned first appellate Court found that the claim of the accused that he had paid a sum of Rs. 1,95,000/- could not be accepted but on balance of probabilities, the learned appellate Court found that the version of the accused that the accused had taken an advance of Rs. 1,50,000/- and had given 6 blank cheques towards its repayment with the understanding that for each month the complainant should deposit one cheque for an amount of Rs. 25,000/- to be more convincing.

8. Learned Counsel on behalf of the complainant submits that the accused in the memorandum of appeal before the first appellate Court, had taken the plea that he had taken a total loan of Rs. 1,50,000/- and which statement he also had made in the defence evidence and, therefore, once the accused accepted that he had taken the amount of Rs. 1,50,000/- and having failed to prove the same, the accused had failed to rebut the presumption available to the complainant in terms of the relevant provisions of the Act. Learned Counsel on behalf of the complainant further submits that the accused denied having received the statutory notice, in cross-

examination of the complainant, but admitted having received the same in his statement under Section 313 of Code, and his failure to reply to the same, should be taken as a strong circumstance against the case of the accused and in support of the submission learned Counsel has placed reliance on the case of ***Gorantla Venkateswara Rao V/s. Kolla Veera Raghava Rao & Anr. (2006 CRI.L.J. 1)*** wherein the Andhra Pradesh High Court has held that the failure of the accused in giving reply to the legal notice is one of the strong circumstances to draw an inference that the accused borrowed the amount from the complainant and the cheque was issued towards part payment of the legally enforceable debt. Learned Counsel on behalf of the complainant has further submitted that by virtue of the said two applications dated 30/10/2002 and 2/06/2004 filed by the accused, the accused had admitted his liability and not only that, had made subsequent payments in the total sum of Rs. 17,500/- and this admission further goes to prove the falsity of the case of the accused and in support of this submission learned Counsel has placed reliance on the case of ***Girishbhai Natvarbhai Patel V/s. State of Gujarat 7 Anr. (2006 (3) ALL MR (JOURNAL) 51)*** wherein filing of an application was taken as one of the circumstance to disbelieve the version of the accused.

9. On the other hand, learned Counsel on behalf of the accused, has submitted that the complainant is a money lender and by virtue of the Goa Money Lenders Act, 2001, the accused would not be able to recover the

amount lent by the complainant. Learned Counsel on behalf of the accused has further drawn my attention to Section 269 (SS) of the Income Tax Act, 1961 which prohibits giving of a loan otherwise than by an account payee cheque and as per learned Counsel since the loan was not advanced and otherwise was not reflected in the income tax returns of the complainant, the complainant's version that the cheque was given towards a debt could not be accepted.

10. Firstly, it must be stated that whether a complainant is a money lender or not as defined by Section 2(B)(1) of the Goa Money Lenders Act, 2001 is essentially a question of fact and as far as the complainant in this case is concerned there was not even a suggestion put to him that he was a money lender and had advanced the subject loan to the accused in the course of his business of money lending and in such a situation the submission of learned Counsel on behalf of the accused cannot be accepted. As per the complainant, the accused had given to the complainant the subject cheque of Rs. 4,30,000/- dated 23/10/2000 towards the loan advanced by the complainant to the accused in October, 2000. Sections 118, 138 and 139 have created several presumptions in favour of the complainant or of a holder of a cheque and Section 139 particularly provides that “it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part,

of any debt or other liability". In other words, it is well settled by now, that the presumption under Section 139 of the Act is mandatory and there is no choice left to the Court and it is also well settled that it is for the accused to prove to the contrary that the cheque issued by the accused was without consideration or that it was not issued in whole or in part payment of a debt or other liability. The Apex Court in the case of ***K. N. Beena V/s. Muniyappan & Anr. (AIR 2001 SC 2895)*** has stated that the burden that the cheque had not been issued against any debt or liability is on the accused and that can be proved at the trial by leading evidence that there was no debt or liability. The Apex Court has also observed that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man. What degree of probability amounts to proof is an exercise particular to each case. The concept of probability and the degrees of it cannot be obviously expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof on balance of probabilities. As is often said, forensic probability must, in the last analysis, rest on a common sense and ultimately on the trained intuition of the Magistrate. Although, the accused does not lead any evidence in rebuttal, it does not mean that the accused cannot take advantage of the cross-examination of the complainant in rebutting the said

presumption.

11. The accused who is stated to be a tax consultant chose not to reply to the statutory notice sent by the complainant demanding the amount due on the cheque issued by the accused to the complainant which according to the complainant was issued towards the amount lent by the complainant to the accused and that is the first weakness of the case of the accused as held in ***Gorantla Venkateswara Rao (supra)***. Thereafter, the accused filed two applications dated 30/10/2002 and 2/06/2004 stating that he would make full payment and made payment of Rs. 22,500/- on different dates and this again falsifies the defence of the accused. The accused even settled one of the cases pertaining to cheque for Rs. 65,000/-. Later, the accused did not even put forward what was his plea, in the cross-examination of the complainant, namely that the complainant had advanced to the accused only a sum of Rs. 1,50,000/- and came with the said plea not even in his statement recorded under Section 313 of the Code, but only in his evidence before the Court. The said plea that the accused had issued 6 blank cheques towards a repayment of Rs. 1,50,000/- taken by him to be filled by the complainant for 6 different months sounds highly improbable as it comes from the accused, who is a tax consultant and moreover, at the stage it was taken, shows clearly that it was taken as an afterthought. If the plea was to be accepted in the manner pleaded by the accused, then in all probability the accused would

have written each of the said 6 cheques for different months and for each month with the figure of Rs. 25,000/-. In my view, no prudent person could have accepted such a plea put forward by the accused and that too at a belated stage of his own evidence without the same, first being put in the cross-examination of the complainant and later without the same being taken in his statement recorded under Section 313 of the Code. In my view, only because the complainant was unable to show the advance of loan in his income tax returns or for that matter the same having not been made by the cheque was insufficient to rebut the presumptions which were available to the complainant particularly the presumption under Section 139 of the Act. The case of the accused has been inconsistent throughout and, therefore, could not have been accepted as a probable defence to the case of the complainant.

12. The learned first appellate Court does not at all appear to have considered the effect of the said presumption and to that extent the judgment of the appellate Court has to be considered as perverse.

13. In my view, the learned trial Court had considered all the aspects of the case and had rightly convicted the accused under Section 138 of the Negotiable Instruments Act, 1881.

14. As regards the sentence, the learned trial Court had sentenced the

accused to undergo SI for a period of one year and ordered the accused to pay compensation of Rs. 8,60,000/- and in default to undergo 6 months' further imprisonment. After hearing the learned Counsel on behalf of both the parties, I find there is scope for reduction of substantive sentence and also compensation. I find that the sentence imposed upon the accused is rather excessive. Considering the facts of the case, therefore, the sentence imposed upon the accused is hereby reduced from one year SI to 5 months SI and the compensation from Rs. 8,60,000/- to Rs. 6,45,000/-, and in default the accused shall undergo 7 months SI.

15. Appeal allowed on above terms.

N.A. BRITTO, J.

NH/-